In the Planning and Environment Court No D205 of 2019
Held at: Maroochydore

Between:	**Friends of Buddina Ltd**	Applicant
And:	**Sunshine Coast Council**	First Respondent
And:	**Pacific Diamond 88 Pty Ltd**	Second Respondent

APPLICANT'S OUTLINE OF ARGUMENT

CONTENTS

Name: P&E Law
Service Address: 4/59 The Esplanade, Maroochydore
Phone: 07 5479 0155
Fax: 07 5479 5070
Email: helen@paelaw.com

INTRODUCTION

1. The Court has examined the tests to be applied in merits review of impact assessable development under the *Planning Act 2016* (**PA**) on many occasions, most notably in *Ashvan* and subsequent cases.[1]

2. These proceedings raise important questions for the tests to be applied for code assessable development in declaratory proceedings under s 11 of the *Planning and Environment Court Act 2016* (**P&E Court Act**). Because of their limited nature, which is akin to judicial review,[2] declaratory proceedings against code assessable development are much less common that normal appeals involving merits review by the Court.

3. Unusually for declaratory proceedings akin to judicial review, the Second Respondent (**the proponent**) relies on expert evidence on the merits of decisions made by the First Respondent (**Council**). The Applicant objects to this evidence on the basis that it is irrelevant to the issues in dispute. Should the Court decide that such evidence is admissible, it would dramatically expand the ability of third parties to challenge code assessable development in declaratory proceedings in the future. If that occurs, declaratory proceedings against code assessable development will become *de facto* merits review. Such a change would be revolutionary.

4. While the Applicant would welcome such a change and it would be in the Applicant's interest to support it for future proceedings against similar code assessable developments in the area that impact on turtles, it does not consider that is the correct approach according to law and, therefore, it does not seek to rely on expert evidence itself in these proceedings.[3]

PRINCIPAL ISSUES FOR DETERMINATION

5. The principal issues that the Court must determine in these proceedings are:

   (a) The nature of the Court's jurisdiction in the proceedings.

   (b) Whether evidence on the merits of the Council's decision is admissible.

   (c) How a statement of reasons should be interpreted in the context of documents before the Council when it made its decision.

   (d) Whether in this case the Council's statements of reasons establish any of the three errors identified in the Amended Originating Application (**AOA**), which can be summarised as:[4]

---

[1] *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPEC 16; [2019] QPLR 793 (Williams QC DCJ) (***Ashvan***), recently cited with approval in *Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253 at [62] per Henry J (with whom Fraser and Morrison JJA agreed); and approved in *Abeleda v BCC* [2020] QCA 257 at [52]-[62] per Mullins JA (with whom Brown and Wilson JJ agreed).

[2] See *Perivall PL v Rockhampton RC* [2018] QPEC 46 at [68] (Kefford DCJ) citing *Eschenko v Cummins & Ors* [2000] QPEC 37; [2000] QPELR 386, 389 [20]; *Ferreyra & Ors v Brisbane City Council & Anor* [2016] QPEC 10; [2016] QPELR 334 (Kefford DCJ); *Mirvac Queensland Pty Ltd v Ipswich City Council & Anor* [2019] QPEC 62 at [5] and [39] (Everson DCJ); and *Glamston Pty Ltd v 11 Ludlow Pty Ltd & Anor* [2020] QPEC 54 at [11] (Everson DCJ).

[3] Correspondence raising these objections was exhibited to the affidavit of Helen Christine Smith affirmed and filed on 25 September 2020, [2]-[10], annexures HCS-15 to HSC-23 (Court Doc No 15).

[4] For economy of language and because many grounds of judicial review overlap to an extent, in these submissions the Applicant will use "failing to properly consider or misconstruing" as shorthand for all of the grounds identified in the AOA, e.g. at AOA [24], including jurisdictional error, errors of law, that the procedures that were required by law to be observed were not observed, and failing to take into account a relevant consideration.

(i) failing to properly consider or misconstruing the assessment benchmark stated in the overall outcome in s 8.2.5.2(2)(i) of the *Coastal Protection Overlay Code* (**CPO Code**) in the planning scheme that "development adjacent to beachfront areas is located and designed to protect the character of the beachfront when viewed from the beach and integrates with the surrounding natural landscape and skyline vegetation." (**the beachfront character errors**).[5]

(ii) failing to properly consider or misconstruing the assessment benchmark stated in Performance Outcome (**PO**) 12 of the CPO Code of the planning scheme and, in particular, whether the development maintains or enhances coastal ecosystems including turtle nesting habitat on Buddina Beach (**the coastal ecosystem errors**).[6]

(iii) failing to properly consider or misconstruing the assessment benchmark stated in s 6.2.3.2(2)(f)(iii) of the *High Density Residential Zone Code* (**HDRZ Code**) that there is no unreasonable loss of amenity for surrounding premises having regard to impacts upon views and vistas (**the views and vistas errors**).[7]

(e) If any of the three errors identified in the AOA are established, could the error/s have materially affected the decision?

6. This outline begins with a summary of the background to the proceedings and legislative context then addresses each of the principal issues that the Court must determine.

BACKGROUND

7. The development the subject of these proceedings is a code assessable material change of use application for 73 multiple dwelling units and a shop (**the development**) at 2 & 6 Talinga St, 84 & 85 Pacific Boulevard and 61 & 63 Iluka Avenue, Buddina (**the land**). The Second Respondent is the applicant for the development.

8. The land currently has residential houses on it and is separated from the ocean by only a road (Pacific Boulevard) and the vegetated dune area (Figure 1).

Figure 1: Marketing image of the development site and Buddina Beach looking north[8]

[5] AOA grounds 12A, 31A, 32, 33, 42 and 43.
[6] AOA grounds 12, 24, 32, 33, 38 and 39.
[7] AOA grounds 14, 30, 31, 32, 33, 40 and 41.
[8] Extracted from exhibit HCS-24 (p 59) to the affidavit of Helen Christine Smith affirmed and filed on 25/9/20.

9. The land is at the northern end of the bell-shaped "Buddina Urban Village" identified in the *Kawana Waters Local Plan Code* under the *Sunshine Coast Planning Scheme 2014*, as in force at 10/12/2018 (**the planning scheme**) [9] (Figure 2).

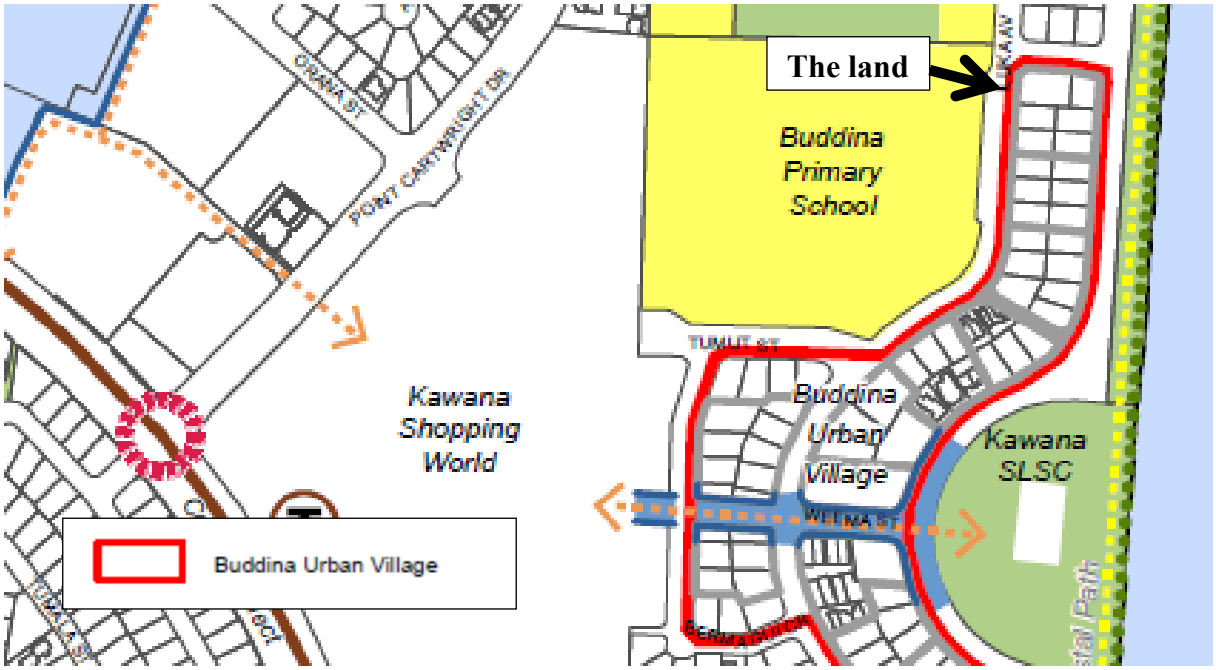


Figure 2: Location of the land in the Buddina Urban Village under the *Kawana Water Local Plan Code*[10]

Figure 3: 3D render of the proposed corner store and building entry from Talinga Street (two storeys of underground carparking are proposed to be located beneath the building).[11]

[9] The Book of Documents (**BD**) contains relevant extracts of the planning scheme in Docs 18 & 19, pp 296-355.
[10] Extracted and adapted from insert of a map in BD, p 346.
[11] BD, Doc 2, p 23.

Figure 4: 3D render of the proposed development from Talinga/Iluka Avenue corner[12]

10. The development application was lodged on 19 July 2018 but on 11 December 2018 it was revised to reduce the scale and number of units. After this change it proposed a material change of use for 73 multiple dwelling units and a shop (Figure 3 and Figure 4).

11. The development comprises a 21m high building located across 6 lots.[13] It contains two levels of basement carparking (188 cars) with dual access from both Iluka Avenue (primary access) and Talinga Street.

12. The unit configuration changed over time and ultimately includes:

    (a) 66 x 3 bedroom units;
    (b) 6 x 4 bedroom units (split level villas fronting Pacific Boulevard);
    (c) 6 x 4 bedroom penthouse units; and
    (d) 1 x 5 bedroom penthouse unit.

13. On the side facing the ocean (next to Pacific Boulevard) the development comprises 8 levels in total: two levels of carparking beneath the ground (basement and level 1); a ground level of two-storey villas (levels 2-3); three levels of single-storey units (levels 4-6); and penthouses with a mezzanine level (levels 7-8).

14. The land is located within the *Kawana Waters Local Plan* area (with a height limit of 21m) under the planning scheme. The intended use of the land for medium/high density residential development with a maximum building height of 21m has been established since the commencement of the former planning scheme (*Caloundra City Plan 2004*) in September 2004 where the land was included in the Multi Unit Residential Precinct and the "Buddina Urban Village" within the *Kawana Waters Planning Area* and related code.

15. Two 3D renders of the development submitted during the assessment process show that the penthouses and upper floors will be visible from the beach (Figure 5 and Figure 6) as does advertising material for the development (Figure 7).

---

[12] BD, Doc 2, p 23.
[13] The real property descriptions of the 6 lots are: Lot 1 on RP 201319 and Lots 280, 281, 282, 310 & 311 on B 92911.

Figure 5: 3D render of the development showing penthouses and units beneath them on level 6 are visible from the beach. [14]

Figure 6: 3D render of the development showing penthouses and the units beneath them on level 6 are visible from the beach. [15]

[14] BD, Doc 1, p 9.
[15] BD, Doc 1, p 10.

Figure 7: Advertising material for the development showing the extent it overlooks Buddina Beach and the adjacent ocean.[16]

16. In relation to the impacts of the development:

    (a) It is common ground that marine turtles use Buddina Beach for nesting in summer months.

    (b) It is also common ground that without measures to avoid and effectively eliminate light from the use of the development there will be negative impacts on turtle nesting and turtle hatchlings.

    (c) No party alleges that conditions to mitigate impacts of the development from lighting on turtles are not reasonably required or not for a planning purpose.[17]

17. On 8 February 2019 Council officers prepared a Detailed Assessment Report on the application (**Detailed assessment report on the application**), assessing the application against the planning scheme, setting out what Council officers considered were the relevant assessment benchmarks.[18] Council officers recommended approving the application on the basis that it:[19]

> The proposed development sufficiently complies with the requirements of the Planning Scheme and does not raise any significant issues that cannot be addressed by reasonable and relevant conditions. Section 60 of the Planning Act requires Council to approve a code assessable application where it is capable of complying with the applicable assessment benchmarks, or could be conditioned to comply. The application is therefore recommended for approval.

18. On 30 April 2019 the Council approved the application under s 60(2) of the PA subject to conditions. On 8 May 2019 Council issued the decision notice for the approval (**the original decision**).[20]

---

[16] Exhibit HCS-25 (p 60) to the affidavit of Helen Christine Smith affirmed and filed on 25 September 2020.
[17] See *Intrapac Parkridge PL v Logan City Council* [2014] QPEC 48; [2015] QPELR 49 at 55 [24] (Rackemann DCJ); and *Sincere International Group PL v GCCC* [2018] QPEC 53 at [24]-[25] (Williamson QC DCJ).
[18] BD, Doc 2, pp 19-46.
[19] BD, Doc 2, p 46.
[20] BD, Doc 3, pp 47-72.

19. On 21 May 2019 a statement of reasons was requested from the Council for the original decision and, on 27 June 2019, Council provided a statement of reasons pursuant to s 33(1) of the *Judicial Review Act 1991* (**JRA**) concluding, at [13], that:[21]

> Given that code assessment undertaken for the Development Application determined that it either complied with all relevant assessment benchmarks or could otherwise be conditioned to comply, Council was required to approve the Development Application under section 60(2)(a) of the Planning Act and was unable to refuse the Development Application, pursuant to section 60(2)(d) of the Planning Act.

20. On 6 June 2019 the proponent made representations to the Council under s 75 of the PA to change the original decision, including in relation to conditions 68-70 regarding lighting to mitigate impacts on turtles.

21. On 10 September 2019 the Council approved a change application under s 76 of the PA (**the negotiated decision**), with some minor changes to conditions 68-70.

22. On 12 September 2019 the Council issued a negotiated decision notice under s 76 of the PA replacing the decision notice for the original decision (**the negotiated decision notice**).[22]

23. The negotiated decision notice imposed a range of conditions, including in relation to lighting and mitigating the impacts on turtles in conditions 62-63 and 68-72.[23]

24. On or around the time of the original decision and/or the negotiated decision, Council published an (undated) notice about the decision on its website under ss 63(5) and 83(9) of the PA describing the assessment benchmarks it considered applied for the development and stating that it considered the development complied with all applicable assessment benchmarks.[24]

25. In addition to the public notice published under ss 63(5) and 83(9) of the PA, on 17 October 2019 the Council provided a statement of reasons pursuant to s 33(1) of the JRA in response to a request made under s 231 of the PA(3).[25]

26. On 5 November 2019 the Applicant filed an Originating Application commencing the proceedings in which the grounds included alleged errors in the conditions for turtle lighting due to the uncertainty of those conditions.[26]

27. On 8 April 2020, after the Originating Application was filed and had been set down for hearing, the proponent applied to Council under s 78 of the PA to change conditions 54, 63, 69, 70 and 73 and add a new condition 70A to the negotiated decision notice to remedy the errors related to conditions identified in grounds 25-29 of the Originating Application (**minor change application**).[27]

---

[21] This document was omitted from the BD. The Applicant has sought the consent of the other parties to tender it as Exhibit 2 (assuming that the BD will be exhibit 1).
[22] BD, Doc 10, pp 171-196.
[23] BD, Doc 10, pp 183-186.
[24] BD, Doc 4, pp 73-75.
[25] BD, Doc 11, pp 197-205.
[26] Court Doc 1, grounds 25-29.
[27] BD, Doc 12, pp 206-219.

28. On 23 July 2020 the Council decided under s 81A of the PA, in a 7:4 slit vote of councilors during an ordinary meeting of the Council,[28] to approve the minor change application (minor change approval) to:

    (a) change conditions 54, 63, 69, 70, 73 and Advice Notice 23; and

    (b) include an additional condition 70A.

29. On 30 July 2020 the Council issued a decision notice under s 83 of the PA for the minor change approval (**decision notice for the minor change approval**).[29]

30. On 28 August 2020 the Council provided a statement of reasons for its decision on the minor change application, stating its reasons were "as per the findings" in a report prepared by Council staff which was tabled, and approved, at the ordinary meeting of the Council on 23 July 2020.[30]

31. The Applicant took the view that the amendments made to conditions 54, 63, 69, 70 and 70A, as contained in the decision notice for the minor change approval, adequately remedied the errors in those conditions.

32. On 4 September 2020 the Applicant filed an AOA accepting that the decision notice for the minor change approval had remedied the errors related to conditions.

33. Those alleged errors are, therefore, no longer at issue, although it is curious that, despite the substantial changes made to the conditions to address the alleged errors, the Council and proponent do not admit any error in the earlier decisions in their respective statements of facts, matters and contentions.

34. The AOA identified three errors remain in the decision-making process, in summary:

    (a) errors in considering and construing the assessment benchmark stated in the overall outcome in s 8.2.5.2(2)(i) of the CPO Code that "development adjacent to beachfront areas is located and designed to protect the character of the beachfront when viewed from the beach and integrates with the surrounding natural landscape and skyline vegetation";[31]

    (b) errors in considering and construing the assessment benchmark in PO12 of the CPO Code that the development "maintains or enhances coastal ecosystems" including turtle nesting habitat on Buddina Beach;[32] and

    (c) errors in considering and construing the assessment benchmark stated in s 6.2.3.2(2)(f)(iii) of the HDRZ Code that there is no unreasonable loss of amenity for surrounding premises having regard to impacts upon views and vistas.[33]

[28] BD, Doc 15, p 266.
[29] BD, Doc 16, pp 267-294.
[30] BD, Doc 17, p 295. The report is BD, Doc 13, pp 220-250.
[31] AOA grounds 12A, 31A, 32, 33, 42 and 43.
[32] AOA grounds 12, 24, 32, 33, 38 and 39.
[33] AOA grounds 14, 30, 31, 32, 33, 40 and 41.

LEGISLATIVE CONTEXT

35. Section 3 of the PA states the objects of the Act and s 4 states the process for achieving the object, including through the development assessment system.

36. Ch 3 of the PA provides the assessment process and decision-making framework for the development.

37. The planning scheme was prepared under the previous legislation but, as it notes in its introduction (s 1.1), it was amended for alignment with the PA by the Minister's rules under s 293 of the Act on 3 July 2017.[34]

38. Under the transitional provisions in s 289, a code, or other matter, against which assessable development must be assessed in a document prepared under the old Act is now called an "assessment benchmark".

39. Section 45(3) and (4) of the PA provides how code assessment is carried out:

> **45 Categories of assessment**
>
> (1) There are 2 categories of assessment for assessable development, namely code and impact assessment.
>
> (2) A categorising instrument states the category of assessment that must be carried out for the development.
>
> (3) A ***code assessment*** is an assessment that must be carried out only—
>
> (a) against the assessment benchmarks in a categorising instrument for the development; and
>
> (b) having regard to any matters prescribed by regulation for this paragraph.
>
> (4) When carrying out code assessment, section 5(1) does not apply to the assessment manager.
>
> …

40. Section 45(5) of the PA provides that impact assessment has wider considerations but that is not directly relevant here.

41. Section 60(2) of the PA provides how a code assessable development must be assessed by an assessment manager such as the Council:

> **60 Deciding development applications**
>
> (1) This section applies to a properly made application, other than a part of a development application that is a variation request.
>
> (2) To the extent the application involves development that requires code assessment, and subject to section 62, the assessment manager, after carrying out the assessment—
>
> (a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and
>
> (b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and

[34] BD, Doc 18(a), p 297.

Examples—

1 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks.

2 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks and a referral agency's response.

(c) may impose development conditions on an approval; and

(d) may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance can not be achieved by imposing development conditions.

Example of a development condition—

a development condition that affects the way the development is carried out, or the management of uses or works that are the natural and ordinary consequence of the development, but does not have the effect of changing the type of development applied for

42. Section 60(3) of the PA provides how impact assessable development must be assessed by an assessment manager but, again, that is not directly relevant here other than in general terms and for context.

43. Williamson QC DCJ stated in *Smout v Brisbane City Council* [2019] QPEC 10; [2019] QPLR 684 (***Smout***) at [54] in the context of assessing an impact assessable application (highlighting added):

> … the planning discretion to be exercised does not mandate that the application must be refused because a non-compliance with an assessment benchmark, namely a planning scheme, has been identified. Given the size, and complexity of modern performance based planning schemes, not every non-compliance, in my view, will warrant refusal. Each non-compliance should be examined having regard to: (1) the verbiage of the planning scheme; and (2) proper town planning practice, and principle[35]. The verbiage of the planning scheme is to be examined to ascertain the planning purpose of, and degree of importance attached to compliance with, a particular planning principle. The extent to which a flexible approach to the exercise of the discretion will prevail in the face of any given non-compliance with a planning scheme (or other assessment benchmark) will turn on the facts and circumstances of each case.

44. His Honour's reference to "proper town planning practice and principle" by reference to "relevant matters" for the purpose of s 45(5)(b) of the PA relates only to impact assessment. It is not, on its face, relevant to code assessment under s45(3) of the PA, which is considerably narrower.

45. Williamson QC DCJ built on the reasoning in *Smout* in *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16; [2019] QPLR 793 (***Ashvan***) at [67]-[85] and set out what must be identified in assessing impact assessable development.[36]

---

[35] Being 'relevant matters' for the purpose of s.45(5)(b) of the PA.

[36] This reasoning has been adopted in many subsequent decisions of the Court, e.g., *Brookside Estate Pty Ltd v BCC* [2019] QPEC 16 at [15]-[25] (RS Jones DCJ); *Harta Pty Ltd v GCCC* [2019] QPEC 37 (Everson DCJ); *Peach v BCC* [2019] QPEC 41 (Williamson QC DCJ); *Murphy v Moreton Bay RC* [2019] QPEC 46 (Kefford DCJ); *Cadmium Holding FW PL v GCCC* [2019] QPEC 51 (Williamson QC DCJ); and *Silk Properties*

46. As noted earlier, the decisions in *Smout* and *Ashvan* concerned impact assessable development and, therefore, not all of the reasoning is applicable to code assessable development. In particular, there is no reference to considering "relevant matters" for code assessment, which Williamson QC DCJ has interpreted to include "proper town planning practice and principle."

47. However, the terms of code assessment under s 60(2) of the PA indicate that the code assessment in accordance with s 45(3) is done before decisions are made on whether to approve an application and what conditions should be imposed. Section 60(2) begins by referring to "after carrying out the assessment", which when read in context refers to the code assessment under s 45(3), before considering whether to approve an application and what conditions to impose. The decision-making process will no doubt be a somewhat iterative process in practice, but s 60(2) clearly contemplates conditions can be used to avoid or mitigate non-compliance with any assessment benchmarks.

48. As noted earlier, Council published a notice about the original decision and negotiated decision pursuant to ss 63(5) and 83(9) of the PA. Section 63(5) provides, relevantly:

> (4) If—
>
> (a) the assessment manager in relation to a development application is—
>
> (i) a local government; or
>
> …
>
> (b) the development application involved—
>
> (i) a material change of use; or
>
> …
>
> the assessment manager must publish a notice about the decision on the assessment manager's website.
>
> (5) The notice must state—
>
> (a) a description of the development; and
>
> (b) a description of the assessment benchmarks applying for the development; and
>
> …
>
> (d) the reasons for the assessment manager's decision; and
>
> (e) if the development application was approved, or approved subject to conditions, and the development did not comply with any of the benchmarks—the reasons why the application was approved despite the development not complying with any of the benchmarks; and
>
> …

49. Section 83(9) provides similar requirements for public notice of approval of a change application.

50. The Second Respondent's change representations leading to the negotiated decision notice were assessed under s 76 of the PA, which required the Council to have "regard to

---

Australia Pty Ltd v Sunshine Coast RC [2020] QPEC 38 at [14] (Cash QC DCJ). *Ashvan* was recently cited with approval in *BCC v YQ Property Pty Ltd* [2020] QCA 253 at [62] per Henry J (with whom Fraser and Morrison JJA agreed) and approved in *Abeleda v BCC* [2020] QCA 257 at [52]-[62] per Mullins JA (with whom Brown and Wilson JJ agreed).

the matters must be considered when assessing a development application, to the extent those matters are relevant." This required Council to consider all of the matters it was required to consider under s 60(2) in assessing the application to the extent they were relevant.

51. The Second Respondent's later application under s 78 of the PA to change conditions 54, 63, 69, 70 and 73 and add a new condition 70A to the negotiated decision notice was assessed under s 81 of the PA and approved by Council under s 81A of the PA.

52. Relevantly, s 81(2)(da) and (e) provide that:

> (2) In assessing the change application, the responsible entity must consider –
> …
> (da) … all matters the responsible entity would or may assess against or have regard to, if the change application were a development application; and
>
> (e) another matter that the responsible entity considers relevant.

53. It is clear from s 81(2) of the PA that in assessing the applications for a minor change the Council was required (or at least entitled) to consider all of the assessment benchmarks under the planning scheme relevant to assessing the application under s 60(2).

54. It is of note that the statutory scheme provides a decision-maker has wide discretion to re-exercise its decision-making powers in subsequent decisions involving minor changes. An earlier decision that is legally ineffective because it failed to consider a relevant consideration or some other error can be corrected in later decisions.[37] Here, however, it is clear that the Council did not seek to correct errors in the original decision in its subsequent decisions concerning the three grounds identified in the AOA; rather, in its subsequent decisions the Council treated its jurisdiction as limited to addressing only the minor changes the proponent sought to make to the approval. The Council had the jurisdiction and power to proceed on a wider basis and could have addressed the three grounds identified in the AOA but it chose not to do so.

55. The three errors in the decision-making process that are identified in the AOA relate to failures to properly consider and construe assessment benchmarks in the planning scheme.

Assessment benchmarks under the planning scheme

56. As is clear from the statutory framework discussed above, the assessment benchmarks under the planning scheme are a mandatory consideration for assessing the development.[38]

57. As a general point, a planning scheme should be construed as a whole adopting a common sense approach.[39] The starting point is the words of the planning scheme read in

---

[37] See in the context of allowing an administrative decision-maker to correct a jurisdictional error in a later decision under different legislation, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 604-605 [11]-[14] per Gleeson CJ; 614-616 [51]-[54] per Gaudron and Gummow JJ (with whom McHugh J relevantly agreed at 619 [67]); 644 [147] & 647 [155] per Hayne J; & 649 [163]-[165] per Callinan J.
[38] In the sense that the decision-maker is *bound* to consider them as discussed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).
[39] *Silk Properties Australia Pty Ltd v Sunshine Coast Regional Council* [2020] QPEC 38 at [13] (Cash QC DCJ), citing *Zappala Family Co PL v BCC* (2014) 201 LGERA 82; [2014] QPELR 686.

their context and in light of the purpose of the PA.[40] In *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44; [2014] 1 Qd R 1 (***AAD Design***) at [37] Chesterman JA said:

> [37] The starting point in the task of construing statutes and like instruments remains, I think, that explained by Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 35 CLR 297 at 304–305:
>
> > "It is an elementary and fundamental principle that the object of the court, in interpreting a statute, 'is to see what is the intention expressed by the words used': *River Wear Commissioners v Adamson*. It is only by considering the meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that words mean what the [sic] say: cf. *Cody v JH Nelson Pty Ltd*. Of course, no part of a statute can be considered in isolation from its context – the whole must be considered. If, when the section in question is read as part of the whole instrument, its meaning is clear and unambiguous, generally speaking 'nothing remains but to give effect to the unqualified, words': *Metropolitan Gas Co v Federated Gas Employees' Industrial Union. ...*

58. As relevant here, s 5.3.3 of the planning scheme states that determining the assessment benchmarks under the planning scheme for code assessment requires:[41]

> (3) The following rules apply in determining assessment benchmarks for assessable development:-
>
> (a) assessable development requiring code assessment:-
>
> (i) must be assessed against all of the assessment benchmarks identified in the "assessment benchmarks for assessable development and requirements for accepted development" column;
>
> ...
>
> (iii) that complies with:-
> (A) the purpose and overall outcomes of the code complies with the code;
> (B) the performance outcomes or acceptable outcomes of the code complies with the purpose and overall outcomes of the code; and
>
> (iv) is to be assessed against any assessment benchmarks for the development identified in section 26 of the Regulation;

59. As noted earlier, under Table 5.5.3 of the planning scheme, a material change of use for multiple dwelling units in the HDRZ is code assessable and the assessment benchmarks are set out in HDRZ Code and other applicable development codes, relevantly:

Table 5.5.3 High density residential zone

HIGH DENSITY RESIDENTIAL ZONE		
Defined use	**Category of development and category of assessment**	**Assessment benchmarks for assessable development and requirements for accepted development**
Residential activities		
Dwelling house	**Accepted development**	• Dwelling house code
Dwelling unit	**Code assessment**	• High density residential zone code • Multi-unit residential uses code • Applicable local plan code • *Prescribed other development codes*
Multiple dwelling	**Code assessment**	• High density residential zone code • Multi-unit residential uses code • Applicable local plan code • *Prescribed other development codes*

[40] *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44; [2014] 1 Qd R 1 at [18]-[20], [37], and [43]-[49] per Chesterman JA and [82] per Philippides J (with whom Margaret Wilson AJA agreed); *Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QCA 147; (2014) 201 LGERA 82; [2014] QPLR 686 at [52]-[58] per Morrison JA (with whom Margaret McMurdo P and Douglas J agreed); and *Gerhardt v Brisbane City Council* [2017] QCA 285 at [31]-[36] per Fraser JA (with whom Morrison JA and Flanagan J agreed).

[41] See BD, Doc 18(c), p 307. Note: for s 5.3.3(3)(iv), there are no relevant additional assessment benchmarks found in s 26 of the *Planning Regulation 2017*.

…

60. The proponent submits in its Statement of Facts, Matters and Contentions (**SOFMAC**),[42] at [9], that:

> (a) under the tables of assessment in Part 5 of the Planning Scheme, assessment benchmarks for development are identified by reference to entire codes, not provisions (eg particular OOs or POs) within codes;
>
> (b) under section 5.3.3(3)(a)(iii) of the Planning Scheme, development will comply with an applicable code if it complies with either:
>
> (i) the purpose and OOs of the code; or
>
> (ii) the POs and AOs of the code; and
>
> (c) accordingly, each individual provision within a code is not an assessment benchmark in its own right, and there is no requirement that development comply with each individual provision within a code.

61. The Council adopts these contentions[43] and they lie at the heart of both the proponent and Council's case.[44]

62. The Applicant disagrees with this construction. Properly read in context and as a whole,[45] to carry out the statutory task required by s 60(2) of the PA, the Council was required to determine whether the application "complies with all of the assessment benchmarks" or "does not comply with some of the assessment benchmarks". That statutory task is evaluative. It cannot be performed without considering the *content* of what the assessment benchmarks are. Here, this requires consideration of each relevant, individual assessment benchmark within the codes identified in Table 5.5.3.

63. The Applicant's construction flows logically from the plain language of s 60(2)(a) of the PA, that the application complies with "all" of the assessment benchmarks.

64. Similarly, when the planning scheme is read as a whole it flows logically from the language of s 5.5.3(3)(i) and (iii) and the related codes that assessable development requiring code assessment must be assessed against "all" of the assessment benchmarks identified in the codes, including each relevant purpose and overall outcome.

65. The proponent and Council's interpretation seeks to substitute the word "some" for the word "all" in s 60(2)(a) of the PA. Similarly, it seeks to substitute the word "some" for "all" in the statement in the HDRZ Code that "All provisions of this code are assessment benchmarks for applicable assessable development".[46] It seeks a similar change to the substance of the CPO Code.[47]

66. In addition to being contrary to the language of s 60(2)(a) of the PA and the planning scheme, the proponent and Council's construction of s 60(2) and the planning scheme does not advance and will not "best achieve" the purposes of the PA or the planning

---

[42] Second Respondent's Statement of Facts, Matters and Contentions, dated 11 September 2020 and filed on 15 September 2020 (Court Doc No 18).
[43] Council's Statement of Facts, Matters and Contentions, 15/9/2020 (Court Doc No 20).
[44] Paragraph [9] of the SOFMAC is referred to repeatedly in subsequent paragraphs of the SOFMAC.
[45] *AAD Design* at [37].
[46] Section 6.2.3.1(2) of the HDRZ Code (BD Doc 18(g), p 325).
[47] See s 8.2.5.1(3) of the CPO Code (BD Doc 18(k), p 349), which does not use the word "all" but clearly that is the intended effect (i.e. each purpose and overall outcome and each PO and AO is an assessment benchmark). Note also s 1.3.3 (Punctuation) of the planning scheme for interpreting the lists of POs and AOs in the CPO Code.

scheme.[48] There is no real benefit to adopting the proponent and Council's construction. They confuse and conflate the initial question of whether the application "complies with all of the assessment benchmarks" with the subsequent discretion to approve an application even if it does not comply will all of the assessment benchmarks. If a development does not comply with each individual assessment benchmark stated in a code, s 60(2)(b) still allows an application to be approved (but only after properly considering the assessment benchmarks).

67. Within this general issue of the construction of s 60(2) and the planning scheme, the alleged errors of relevance here are the three errors identified in the AOA in relation to errors in properly considering and construing:

    (a) the assessment benchmark stated in the overall outcome in s 8.2.5.2(2)(i) of the CPO Code;[49]

    (b) the assessment benchmark in PO12 of the CPO Code;[50] and

    (c) the assessment benchmark stated in s 6.2.3.2(2)(f)(iii) of the HDRZ Code;[51] and

68. The assessment benchmark relevant to the first error is the overall outcome in s 8.2.5.2(2)(i) of the CPO Code.[52]

69. Section 8.2.5.1(3)(a) of the CPO Code states that the provisions of s 8.2.5.2 (Purpose and overall outcomes) are assessment benchmarks for the code.

70. Section s 8.2.5.2(2)(i) of the CPO Code provides:

> **8.2.5.2 Purpose and overall outcomes**
>
> (1) The purpose of the Coastal protection overlay code is to:-
>
> …
>
> (i) development adjacent to beachfront areas is located and designed to protect the character of the beachfront when viewed from the beach and integrates with the surrounding natural landscape and skyline *vegetation*.

71. The assessment benchmark of relevance to the second error is PO12 in Table 8.2.5.3.2 (Performance outcomes and acceptable outcomes for assessable development) of the CPO Code.

72. Section s 8.2.5.1(3)(b) of the CPO Code states that the provisions of Table 8.2.5.3.2 (Performance outcomes and acceptable outcomes for assessable development) are assessment benchmarks for the code.

73. PO12 in Table 8.2.5.3.2 of the CPO Code states:[53]

> **Table 8.2.5.3.2 Performance outcomes and acceptable outcomes for assessable development**
>
> …

[48] Contrary to s14A of the AIA.
[49] AOA grounds 12A, 31A, 32, 33, 42 and 43.
[50] AOA grounds 12, 24, 32, 33, 38 and 39.
[51] AOA grounds 14, 30, 31, 32, 33, 40 and 41.
[52] AOA grounds 12A, 31A, 32, 33, 42 and 43.
[53] See BD, Doc 18(k), p 353.

Protection of Sand Dunes and Coastal Creeks			
PO12	Development:- (a) maintains dune crest heights and minimises and mitigates the risk to development from wave overtopping and storm tide inundation; and (b) maintains or enhances coastal ecosystems and natural features such as coastal creeks, mangroves and coastal *wetlands*, particularly where these features protect or buffer communities and *infrastructure* from sea-level rise and coastal inundation impacts.	**AO12**	No acceptable outcome provided.

74. The assessment benchmark of relevance to the third error is the overall outcome stated in s 6.2.3.2(2)(f)(iii) of the HDRZ Code protecting impacts on views and vistas.

75. Section 6.2.3.1(2) of the HDRZ Code states that: "All provisions in this code are assessment benchmarks for applicable assessable development."

76. Section 6.2.3.2(2)(f)(iii) of the HDRZ Code provides (highlighting added):[54]

> **6.2.3.2 Purpose and overall outcomes**
>
> (1) The purpose of the High density residential zone code is to provide for medium and high density residential activities generally in a medium rise format, predominantly comprising multi-unit residential uses for permanent residents supported by community activities and small-scale services and facilities that cater for local residents.
>
> (2) The purpose of the High density residential zone code will be achieved through the following overall outcomes:-
>
> ...
>
> (f) development ensures that there is no unreasonable loss of amenity for surrounding premises having regard to:-
>
> (i) microclimate impacts, including the extent and duration of any overshadowing;
> (ii) privacy and overlooking impacts;
> (iii) impacts upon views and vistas; and
> (iv) building massing and scale relative to its surroundings;

77. The errors in the decision-making process involving these assessment benchmarks are addressed below after considering the nature of the Court's jurisdiction in these proceedings.

NATURE OF THE COURT'S JURISDICTION IN THESE PROCEEDINGS

78. This application involves declaratory proceedings under s 11 of the P&E Court Act. Section 11 provides, relevantly:

> **11 General declaratory jurisdiction**
>
> (1) Any person may start a P&E Court proceeding seeking a declaration (a ***declaratory proceeding***) about—
>
> (a) a matter done, to be done or that should have been done for this Act or the Planning Act; or
>
> (b) the interpretation of this Act or the Planning Act; or
>
> (c) the lawfulness of land use or development under the Planning Act; or
>
> ...

[54] See BD, Doc 18(g), p 325.

> *Note—*
>
> Under the *Acts Interpretation Act 1954*, section 7, a reference to an Act in this list of subject matter about which a declaration may be sought includes a reference to the statutory instruments made under the Act.
>
> …
>
> (4) The P&E Court may also make an order about any declaration it makes.

79. In considering the legislative context to properly construe the nature of the Court's jurisdiction in proceedings such as these, it is relevant that:

    (a) Section 180 of the PA provides that any person may start a proceeding in the Court for an enforcement order to restrain or remedy a development offence.

    (b) Section 229 and Sch 1 of the PA allow appeals to the Court against a wide range of decisions but not, relevantly, by members of the public opposed a code assessable development.

    (c) Appeals to the Court under s 229 of the PA are by way of hearing anew[55] in which the Court assesses the proposed development on its merits in the light of expert evidence.

    (d) Section 231 of the PA generally prevents judicial review proceedings under the JRA in the Supreme Court against decisions under the PA; however, s 231(3) of the PA allows requests to be made for a statement of reasons under Part 4 of the JRA.[56]

80. Declaratory proceedings under s 11 of the P&E Court Act may have different purposes and involve matters that are quite different in nature. For instance, the Court's decision in *Sunshine Coast Regional Council v D Agostini Property Pty Ltd and Others* [2019] QPEC 52 (***D Agostini***) in proceedings under s 11 of the P&E Court Act involved a dispute over the legality of an actual use of land that has been occurring for years. These proceedings were akin to enforcement proceedings under s 180 of the PA but seeking declaratory relief to determine the legality of the use of the land in question.

81. In contrast to the nature of the dispute in *D Agostini*, declaratory proceedings under s 11 involving a challenge to the legality of an administrative decision made by a local government are akin to judicial review.[57] As Searles DCJ said in *Holcim (Australia) PL v Brisbane City Council & Ors* [2012] QPEC 32 at [3] regarding similar declaratory powers of the Court under previous legislation:

> … an application seeking declaratory relief, as here, is in the nature of proceedings for judicial review, so that the court does not embark on a consideration of the merits of the matter but is confined to considering whether, on administrative law grounds, the decision is legally flawed.[58]

---

[55] P&E Court Act, s 43.

[56] Note Kefford DCJ's criticism for not requesting a statement of reasons in *Perivall PL v Rockhampton RC* [2018] QPEC 46 at [69].

[57] See *Perivall PL v Rockhampton RC* [2018] QPEC 46 at [68] (Kefford DCJ) citing *Eschenko v Cummins & Ors* [2000] QPEC 37; [2000] QPELR 386, 389 [20]; *Ferreyra & Ors v Brisbane City Council & Anor* [2016] QPEC 10; [2016] QPELR 334; *Mirvac Queensland Pty Ltd v Ipswich City Council & Anor* [2019] QPEC 62 at [5] and [39] (Everson DCJ); and *Glamston Pty Ltd v 11 Ludlow Pty Ltd & Anor* [2020] QPEC 54 at [11] (Everson DCJ). See also *Holcim (Australia) PL v Brisbane City Council & Ors* [2012] QPEC 32 at [3] (Searles DCJ), citing *Di Marco v Brisbane City Council & Ors* [2006] QPEC 35 at [14]-[16].

[58] *Di Marco v Brisbane City Council & Ors* [2006] QPEC 35 at [14]-[16].

82. The past decisions of the Court[59] make it clear that, in contrast to merits appeals, in declaratory proceedings involving a challenge to an administrative decision made by a local government the Court's role is not to decide what is the correct decision based on the evidence and planning scheme, to resolve conflicting evidence about the impacts of the project, or weigh up discretionary factors. The Court's role is limited to reviewing whether the local government complied with the requirements imposed by the law such as taking all relevant considerations into account and that its decision was not affected by an error of law. As Bowskill QC DCJ (as her Honour then was) said in *Ferreyra & Ors v Brisbane City Council & Anor* [2016] QPEC 10; [2016] QPELR 334 (***Ferrayra***) at [5], in a case involving an application for declaratory relief under s 456 of the *Sustainable Planning Act 2009* (**SPA**) (footnotes in original):

> [5] It is well-established that the function of the court in proceedings which seek declaratory relief of this kind are analogous to judicial review proceedings.[60] Consequently, the same constraints apply. As recently observed by French CJ, Bell, Keane and Gordon JJ in *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 327 ALR 8 at [23]:
>
> "These constraints are aspects of the scope of judicial review of administrative action, which is confined to the legality of the Delegate's decision. In particular, judicial review is concerned with whether the Delegate's decision was one which he was authorised to make; it is not:[61]
>
> > 'an appellate procedure enabling either a general review of the … decision… or a substitution of the … decision which the … court thinks should have been made.'"

83. While findings of fact cannot be challenged directly through judicial review, the process that led to those findings can be challenged in appropriate grounds of judicial review.

84. Here, the errors in the decision-making process identified in the AOA include that the Council failed to take relevant considerations into account. Mason J emphasized in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 that this ground of judicial review can only be made out if the decision-maker failed to take into account something they were *bound* to take into account in making the decision. Whether the decision-maker is bound to consider something, or forbidden from considering it, are questions to be answered by construing the relevant Act, including its subject matter, scope and purpose.[62] Here, the assessment benchmarks are clearly mandatory considerations under s 60(2) of the PA.

85. Other important grounds of review raised in the AOA involve errors of law and jurisdictional errors. It is well established that where an administrative decision-maker is under a duty but misconceives the nature of the duty or has not applied themselves to the question which the law prescribes their decision or action may be set aside.[63]

86. Brennan, Deane, Toohey, Gaudron and McHugh JJ stated in *Craig v South Australia* (1995) 184 CLR 163 (***Craig***) at 179:

---

[59] See the cases listed in footnote n 57.

[60] *Eschenko v Cummins* [2000] QPELR 386 at [20]; *Westfield Management Ltd v Brisbane City Council & Anor* [2003] QPELR 520 at [55]-[57]; *Di Marco v Brisbane City Council & Ors* [2006] QPELR 731 at [14]; *Wheldon & Anor v Logan City Council & Anor* [2015] QPELR 640 at [18]; *Birkdale Flowers Pty Ltd v Redlands City Council & Anor* [2016] QPEC 4 at [47].

[61] Referring to *Craig v South Australia* (1995) 184 CLR 163 at 175; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41-42; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

[62] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).

[63] See, e.g., *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at 242 per Rich, Dixon and McTeirnan JJ.

> If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

87. Gaudron J stated in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (***Yusuf***) at 339-340 [41]-[44] (citations omitted):

> … there is said to be a "constructive failure to exercise jurisdiction" when a tribunal misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form. A constructive failure to exercise jurisdiction may be disclosed by the Tribunal taking an irrelevant consideration into account. Equally, it may be disclosed by the failure to take a relevant matter into account.
>
> … it may be that the failure of the Tribunal to take a particular matter into account indicates that, in the circumstances, the Tribunal has misunderstood its duty or applied itself to the wrong question and has, on that account, failed to conduct a review as required …
>
> … the failure of the Tribunal to make findings with respect to a particular matter may, at the same time, reveal failure to exercise jurisdiction, whether actual or constructive, and, also, failure to conduct a review as required by the Act. …

88. McHugh, Gummow and Hayne JJ in *Yusuf* at 352 [84], after quoting the passage from *Craig* set out above and discussing various aspects of jurisdictional error, stated:

> If the Tribunal identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material in such a way as affects the exercise of its powers, that will very often reveal that it has made an error in its understanding of the applicable law or has failed to apply that law correctly to the facts it found. If that is so, the ground [of error of law] is made out.

89. Hayne J in *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26 (***FTZJ***) at [25] stated, citing the passages from *Craig* and Guadron J's reasons in *Yusuf* set out above:

> For the reasons which follow, the error of law the appellant identified was a jurisdictional error. The tribunal failed "to apply itself to the real question to be decided or [misunderstood] the nature of the opinion it [was] to form".

90. Bell and Crennan JJ in *FTZK* at [90], in considering whether a jurisdictional error had been committed, stated (citations omitted):

> … empowering legislation can show that a tribunal's identification of what it considered to be relevant matters may demonstrate that it asked itself the wrong question, as explained [by Gaudron J at [69]] in *Yusuf*. Equally, it may demonstrate that a tribunal has misconstrued its functions and powers to decide, by taking into account matters which are irrelevant given the language of the empowering provision and the scope and purpose of the whole Act. Either form of error requires the impugned decision to be set aside.

91. Kiefel CJ, Gageler and Keane JJ said in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (***Hossain***) at 133 [24] – 134 [27] (footnotes omitted):

> [24] Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking

> characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction. …
>
> [27] Just as identification of the preconditions to and conditions of an exercise of decision-making power conferred by statute turns on the construction of the statute, so too does discernment of the extent of non-compliance which will result in an otherwise compliant decision lacking the characteristics necessary to be given force and effect by the statute turn on the construction of the statute. The question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a magnitude which has resulted in taking the decision outside the jurisdiction conferred by the statute cannot be answered except by reference to the construction of the statute.

92. In summary, the Court's jurisdiction in these proceedings is limited to determining whether the Council's decision-making process was lawful within the confines of normal judicial review. In the context of the grounds of review stated in the AOA, the Court's jurisdiction does not extend to reviewing the merits or reasonableness of the Council's decision.

EVIDENCE ON THE MERITS OF THE COUNCIL'S DECISION IS INADMISSIBLE

93. Given the limited nature of judicial review, the parties are not normally permitted to call expert witnesses or rely upon evidence that was not before the decision-maker whose decision is challenged. There are limited exceptions to this[64] but none are relevant on the grounds raised in the AOA.

94. As Bowskill QC DCJ (as her Honour then was) said in *Ferreyra* at [5]-[7], in a case involving an application for declaratory relief under s 456 of SPA (footnote in original):[65]

> [7] Because the scope of judicial review is confined to the legality of the decision, rather than the merits of it, ordinarily, material which was not before the decision-maker at the time of making the decision will not be admissible in a proceeding such as this.[66]

95. Her Honour went on to consider an exception to this rule where an application for judicial review is based in part upon legal unreasonableness, expert evidence may be admissible, particularly where the impugned decision concerns specialised or technical matters, in respect of which expert evidence may assist the court.[67] As unreasonableness was raised in that case as a ground of review, her Honour allowed expert evidence to address it.

---

[64] For example, in judicial review involving a question of whether a document an administrative decision maker wrongly failed to take into account could have materially affected the decision, "evidence of the content of the document or information is relevant and admissible": *Minister for Immigration and Border Protection v SZMTA & Ors* (2019) 264 CLR 421 at 446 [50] per Bell, Gageler and Keane JJ. Another exception is where a decision is alleged to have been so unreasonable that no reasonable decision maker could have made it: *Ferreyra v BCC* [2016] QPEC 10; [2016] QPELR 334 (Bowskill QC DCJ) at [9].

[65] See also *Mirvac Queensland Pty Ltd v Ipswich City Council & Anor* [2019] QPEC 62 at [39] (Everson DCJ).

[66] *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379 at 391; *Australian Retailers Association & Ors v Reserve Bank of Australia* (2005) 148 FCR 446 at [454]-[456].

[67] *Ferreyra & Ors v Brisbane City Council & Anor* [2016] QPEC 10; [2016] QPELR 334 at [9], citing *Australian Retailers Association & Ors v Reserve Bank of Australia* (2005) 148 FCR 446 at [376], [457]-[460] and [471] per Weinberg J.

96. In *D Agostini*,[68] which involved declaratory proceedings under the PA, the Court noted that "the opinion of an expert about the construction of a planning approval is not admissible";[69] however, the parties were permitted to call expert evidence in the context of the nature of issues raised, which involved the lawfulness of the actual use of land at Pelican Waters as a "motel" or "temporary accommodation". Even so, much of the evidence was rejected as irrelevant to the issues to be determined by the Court in that preliminary hearing and did not assist in construing the development approval[70] but was "helpful to understand the plans incorporated into the development approval."[71] That limited assistance does not arise on the grounds of this application. This case involves a challenge to the legality of a recent administrative decision made by the Council that can be decided based on the documents before the Council and its reasons. Unlike the circumstances in *D Agostini*, this case does not involve consideration of the legality of an actual use of land that has been occurring for years.

97. The grounds raised in these proceedings involve conventional grounds of judicial review such as that the Council's decisions were affected by jurisdictional error and errors of law, and that the procedures that were required by law to be observed in connection with the making of the decisions were not observed.

98. Unusually for judicial review proceedings, here the proponent seeks to rely on three expert reports to attempt, *ex post facto*, to remedy Council's errors and turn the proceedings into *de facto* (or, perhaps, *actual*) merits review. The proponent seeks to tender the expert reports of:

    (a) Christopher John Schomburgk in relation to town planning matters;[72]

    (b) Paul Anthony King in relation to lighting impacts;[73] and

    (c) Lauren Maree Thorburn in relation to turtle ecology.[74]

99. The Applicant objects to each of these reports on the basis that they are irrelevant to the issues in dispute.

100. In correspondence between the parties, the proponent relied upon Bowskill QC DCJ's decision in *Ferrayra* for the proposition that expert evidence "may be admissible in proceedings of this nature."[75]

101. The proponent's reliance in *Ferrayra* is misplaced. That decision is against expert evidence being admitted in these proceedings where no ground of review involves legal unreasonableness. The decision is not authority for a general ability to admit expert evidence in declaratory proceedings. As Bowskill QC DCJ said at [7]-[9], expert evidence will ordinarily not be allowed.

---

[68] *Sunshine Coast Regional Council v D Agostini Property Pty Ltd and Others* [2019] QPEC 52 (Cash QC DCJ).
[69] *Sunshine Coast Regional Council v D Agostini Property Pty Ltd and Others* [2019] QPEC 52 (Cash QC DCJ) at [15] citing *HA Bachrach Pty Ltd v Caboolture Shire Council* (1992) 80 LGERA 230, 235 (Pincus, McPherson and Davies JJA); *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 305, 326 (Fitzgerald P).
[70] *Sunshine Coast Regional Council v D Agostini Property Pty Ltd and Others* [2019] QPEC 52 (Cash QC DCJ) at [16], [20] & [23].
[71] *Sunshine Coast Regional Council v D Agostini Property Pty Ltd and Others* [2019] QPEC 52 (Cash QC DCJ) at [23].
[72] Court Doc. 23, filed 14 October 2020.
[73] Court Doc. 22, filed 14 October 2020.
[74] Court Doc. 24, filed 14 October 2020.
[75] See annexure HCS-22, p 40, to the affidavit of Helen Christine Smith affirmed and filed on 25 September 2020 (Court Doc No 15).

102. The expert evidence sought to be relied upon by the proponent does not come within any of the limited exceptions where expert evidence may be permitted in judicial review proceedings. It is inadmissible.

HOW SHOULD THE COUNCIL'S STATEMENT OF REASONS BE INTERPRETED?

103. As noted earlier, over the course of the decision-making process, Council provided "reasons" for its decision under ss 63(5), 83(9) and 231 of the PA and under Pt 4 (particularly ss 33 and 34) of the JRA. Section 231 of the PA generally prevents judicial review proceedings under the JRA in the Supreme Court against decisions under the PA; however, s 231(3) of the PA allows requests to be made for a statement of reasons under Part 4 of the JRA.[76]

104. The PA does not define the term "reasons" but "reasons" are defined in s 3 of the JRA[77] as:

> ***reasons***, in relation to a decision, means—
>
> (a) findings on material questions of fact; and
>
> (b) a reference to the evidence or other material on which the findings were based;
>
> as well as the reasons for the decision.

105. The definition of "reasons" in s 3 of the JRA is similar to the definition of the same term in s 27B of the *Acts Interpretation Act 1954* (**AIA**):

> **27B Content of statement of reasons for decision**
>
> If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also—
>
> (a) set out the findings on material questions of fact; and
>
> (b) refer to the evidence or other material on which those findings were based.

106. In *Gold Coast City Council v Sunland Group Ltd* [2019] 1 QR 304; [2019] QCA 118 (***Sunland***) the Court of Appeal examined the requirements for "reasons" of a decision to issue an infrastructure charges under SPA. While it concerned a different aspect of the preceding legislation to the PA and the adequacy of Council's reasons is not at issue here, it provides useful guidance in this case. The decision at issue that case did not permit an application for a statement of reasons under the JRA,[78] so whether different principles apply for such reasons were not addressed directly, although Morrison JA (with whom Fraser JA and Crow J agreed) noted that the statutory provisions were similar and case law under other statutes provides guidance.[79]

107. Morrison JA summarised the principles for construing the relevant statutory provisions in *Sunland* at [32]-[36]. His Honour stated at [33] and [36] (footnotes omitted):

---

[76] Note Kefford DCJ's criticism for not requesting a statement of reasons in *Perivall PL v Rockhampton RC* [2018] QPEC 46 at [69].

[77] Section 34 of the JRA provides that a statement of reasons under s 33 "must contain the reasons for the decision" by reference to this definition.

[78] *Sunland* at [101].

[79] e.g. *Sunland* at [99] and [107].

> [33] … that the words of a definition section must first be read into the substantive enactment to which it applies and only then can the substantive enactment be construed, bearing in mind its purpose and the mischief that it was designed to overcome. …
>
> [36] … the proper course of statutory construction is to read the words of a definition into the substantive enactment and then construe the substantive enactment. However, definitions are not substantive and therefore the definition itself is not expanded in the same way.

108. After reviewing the statutory scheme of SPA, Morrison JA noted, at [65], that (emphasis in original):

> [65] … the SPA draws a distinction between the notification of a decision where all that is required is the mere fact of it having been made, and where an explanation for that decision is required. Into the former category falls decision notices, approvals, or notices stating factual matters. Into the latter are those decisions where the recipient is required to be told why the decision was reached, or explaining the basis for a state of satisfaction, such as a refusal of an application, a conclusion of non-compliance or conflict, a requirement to take action, or an explanation why there was inaction. In the latter category the requirement of explanation is signified by use of phrases such as "reasons for the decision" or "reason **why**" something was done.

109. It is noteworthy that public notices under ss 63(5) and 83(9) of the PA draw the same "distinction between the notification of a decision where all that is required is the mere fact of it having been made, and where an explanation for that decision is required."

110. Section 63(5)(e) of the PA states (highlighting added):

> (e) if the development application was approved, or approved subject to conditions, and the development did not comply with any of the benchmarks—the reasons why the application was approved despite the development not complying with any of the benchmarks; and

111. Similarly, s 83(9)(e) of the PA states (highlighting added):

> (e) the reasons why the change application was approved despite the development not complying with any or all of the benchmarks, if—
>
> (i) the responsible entity was the assessment manager; and
>
> (ii) the development did not comply with any or all of the benchmarks; and
>
> (iii) the responsible entity approved the change application, or approved the change application subject to conditions; and

112. In *Sunland*, Morrison JA concluded that s 27B of the AIA applied to the requirements for "reasons" under s 671 of SPA for an infrastructure charge.[80] One of the factors for reaching this conclusion was:[81]

> there is no definition of "reasons" in SPA [and] the absence of a definition invites the application of s 27B AIA. The purpose of a provision such as s 27B is to "permit economy of language."

---

[80] *Sunland* at [85]-[86].
[81] *Sunland* at [83] citing *Pfeiffer v Stevens* (2001) 209 CLR 57, 65 [25].

113. Such a conclusion appears correct for the requirements of "reasons" under ss 63(5) and 83(9) of the PA. Those sections require reasons that comply with s 27B of the AIA.

114. Here there is no issue that the reasons provided by Council under ss 63(5) and 83(9) of the PA complied with s 27B of the AIA, at least when read together and fairly with the statements of reasons given under ss 33 and 34 of the JRA complied with that Act.

115. While Council's notice under ss 63(5) and 83(9) of the PA did not state the evidence on which the findings were made, the Applicant accepts that this deficiency has been sufficiently remedied by the Council's statements of reasons under the JRA. The Applicant makes no issue of this technical deficiency of form.

116. Rather than challenging the adequacy of the reasons, the issues in these proceedings are *how* those reasons should be interpreted and whether they demonstrate any of the errors alleged in the AOA in all of the circumstances, including omissions of substance.

117. In this context, it is worth noting that, given the limited nature of judicial review, statements of reasons are important in exposing how a decision was reached and whether the correct decision-making process was followed.[82] An administrative decision-maker has a duty to ensure their statement of reasons complies with the legislative requirements.[83]

118. The statutory context of reasons under ss 63(5), 83(9) and 231 of the PA, the last of which is linked to ss 33 and 34 of the JRA, lays the foundation for acceptance of the statements made pursuant to them as evidence of the truth of what they says, namely, that the findings made, the evidence referred to and the reasons set out were those actually made, referred to and relied upon in coming to the decision and that no finding, evidence or reason which was of any significance to the decision has been omitted.[84]

119. While recognising there is a positive duty on a decision-maker to comply with the statutory command to state the "reasons" for a decision, it is important to keep in perspective that the reasons of an administrative decision-maker are meant to inform, and not to be scrutinised upon overzealous review by seeking to discern whether some inadequacy might be gleaned from the way in which the reasons are expressed.[85] It is well established that a statement of reasons is to be considered in a benign way without an assumption of error.[86] Brennan CJ, Toohey, McHugh and Gummon JJ said in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272 (footnotes omitted):

> When the Full Court [whose decision was the subject of the appeal to the High Court] referred to "beneficial construction", it sought to adopt an approach mandated by a long series of cases, the best exemplar of which is *Collector of Customs v Pozzolanic*. In that case, a Full Court of the Federal Court (Neaves, French and Cooper JJ) collected authorities for various propositions as to the practical restraints on judicial review. It was said that a court should not be "concerned with looseness in the language ... nor with unhappy phrasing" of the reasons of an administrative decision-maker. The Court continued: "The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error".

---

[82] See the cases cited in *Sunland* at [99].
[83] *Minister for Immigration, Local Government & Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 179 (French J);
[84] *Minister for Immigration, Local Government & Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 179 per French J (as his Honour then was), discussing a statement of reasons prepared under s 13 of the ADJR Act.
[85] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.
[86] Morrison JA did not refer to these principles in *Sunland* but took this approach in substance: see at [109]-[118].

> These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.

120. Nonetheless, the identification of statutory misconstruction by inference from a statement of reasons is not novel. A misconstruction will often only become apparent by analysis of the reasoning process undertaken by a decision maker because that reasoning process will reveal the legal path followed.

121. Within these general principles it may also be noted that where a decision-maker fails to mention a matter in their statement of reasons it may be inferred that they regarded it as irrelevant or failed to consider it. In *Mees v Kemp* (2005) 141 FCR 385 at [54]-[55], the Full Court of the Federal Court (French, Merkel and Finkelstein JJ) observed (in the context of an appeal from a judicial review application against a decision under s 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)):[87]

> Sections 13(1) and (2) [of the ADJR Act], read together, require a decision-maker who has been requested to give reasons for a decision to provide:
>
> 1. A statement in writing.
> 2. Setting out the findings on material questions of fact.
> 3. Referring to the evidence or other material on which those findings were based.
> 4. Giving the reasons for the decision.
>
> The section requires that reasons be furnished 'which make intelligible the true basis of the decision' – *ARM Constructions Pty Ltd v Commissioner of Taxation* (1986) 10 FCR 197 at 204 (Burchett J). It is remedial and supplies the deficiency of the common law – *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 130 (Gummow J). It is designed to provide persons affected by a decision with sufficient information to decide whether to accept it or to pursue the matter further with the administrative process or through the Court …
>
> The section does not require that the reasons are set out with the degree of precision or detail which might be appropriate to a judicial decision:
>
> > *'But it demands a statement of the real findings and the real reasons. It is an incident of the obligation that the statement should not omit findings or reasons for the decision which may, in the light of a pending review application, appear to be irrelevant or reflective of some false assumption or pre-judgment.' – Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 179 (French J)

122. Ordinarily the failure to refer to a matter in a statement of reasons prepared in accordance with the obligation under ss 33 and 34 of the JRA would lead to the inference being drawn that the decision-maker did not consider it or considered it irrelevant or immaterial.[88]

123. The normal inference is that no finding, evidence or reason which was of any significance to the decision has been omitted from a statement of reasons prepared under ss 33 and 34 of the JRA.[89]

---

[87] See also *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 and *Mees v Kemp* [2004] FCA 366.

[88] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 330-331 [5] per Gleeson CJ; at 338 [37] per Gaudron J; and 346 [69] per McHugh, Gummow and Hayne JJ; and *Mees v Kemp* (2005) 141 FCR 385 at 403, [58] per French, Merkel and Finkelstein JJ.

[89] *Minister for Immigration, Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 179 per French J (as his Honour then was), discussing a statement of reasons prepared under s 13 of the ADJR Act.

124. However, mere failure by the Council to refer to a particular statute or part of the planning scheme in its reasons does not necessarily establish its decision was in error, provided it is clear from the reasons as a whole that the decision-maker addressed the right question. Searles DCJ quoted the following passage with approval in *Holcim (Australia) PL v Brisbane City Council & Ors* [2012] QPEC 32 (***Holcim***) at [53]:[90]

> … so long as the body in question does address the question it is required to address, it does not have to refer explicitly to the statute or instrument that poses the question: the body is required to address the substance of the question, not the fact that the question is posed by a particular statute or instrument. Explicit reference to the statute or instrument will help confirm that the body did address the right question, but absence of such reference does not of itself indicate that it did not.

125. In summary, a fair reading of the substance is required of the Council's reasons, rather than a pedantic reading.

126. In interpreting the Council's reasons, it is also noteworthy that Council has chosen not to supplement its reasons with any affidavits from the decision-makers who made them. Such a course was open to it[91] and could potentially have been used to cure gaps or correct errors in Council's reasons. The absence of such evidence gives an inference that the evidence would not have assisted the Council's case and allows the Court to more confidently draw inferences available to be drawn from the evidence that is before the Court.[92]

THREE ERRORS ARE APPARENT HERE

Error in considering the assessment benchmarks for beachfront character

127. The first error involves failing to properly consider or misconstruing the assessment benchmark stated in the overall outcome in s 8.2.5.2(2)(i) of the CPO Code that:[93]

> development adjacent to beachfront areas is located and designed to protect the character of the beachfront when viewed from the beach and integrates with the surrounding natural landscape and skyline vegetation.

128. The Council made no reference to that assessment benchmark in any of the assessment reports before it or the statements of reasons for its various decisions, namely (collectively, the **Council's supporting reports and reasons**):

    (a) the Detailed Assessment Report, dated 8 February 2019, before Council in making the original decision;[94]

---

[90] Referring to *Notaris v Waverley City Council* (2007) 161 LGERA 230 at 264 (Tobias JA with whom Mason P and Hodgson JA agreed), which itself referred to *Hill v Woollahra Municipal Council* (2003) 127 LGERA 7 at [53] (Hodgson JA with whom Ipp JA and Davies AJA agreed). See also *Land Services of Coast and Country Inc v Chief Executive, Department of Environment and Heritage Protection & Anor* [2016] QSC 272 at [21](d) (Bond J).

[91] See, e.g. *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736; (2006) 232 ALR 510 (Dowsett J) at [23] and [31]-[38]; and *Land Services of Coast and Country Inc v Chief Executive, Department of Environment and Heritage Protection & Anor* [2016] QSC 272 (Bond J) at [13] and [21](b) where a decision-maker was permitted to supplement a statement of reasons with further explanation of the matters considered in a later affidavit.

[92] *Jones v Dunkel* (1959) 101 CLR 298; *Booth v Bosworth* (2001) 114 FCR 39 (Branson J) at [42](c).

[93] AOA grounds 12A, 31A, 32, 33, 42 and 43.

[94] BC, Doc 2, pp 19-46.

(b) Council's public notice and statement of reasons about the original decision and negotiated decision (undated), prepared in accordance with ss 63(5) and 83(9) of the PA;[95]

(c) Council's statement of reasons, dated 27 June 2019, pursuant to s 33(1) of the JRA for the original decision;[96]

(d) Council's statement of reasons for the negotiated decision notice, dated 17 October 2019;[97]

(e) the Detailed Assessment Report, undated, before Council in approving the minor change application;[98]

(f) the minutes of the meeting on 23 July 2020 in which the minor change application was approved;[99]

(g) Council's statement of reasons, dated 28 August 2020, for the minor change application.[100]

129. None of the Council's supporting reports or reasons, listed above, demonstrate that Council was aware of, or properly considered this assessment benchmark.

130. Without descending into the merits, it is objectively clear from the 3D renders of the proposed development viewed from the beach, shown above in Figures 5 and 6, that the proposed development will be very visible above the skyline vegetation when viewed from Buddina Beach. It is a large, box or brick shape that does not reflect the natural skyline vegetation at all. Given this, it cannot be said that the development is "designed to protect the character of the beachfront when viewed from the beach" or that it "integrates with the surrounding natural landscape and skyline vegetation." Nothing in the conditions changes this.

131. Consequently, properly understood, the proposed application even subject to conditions does not comply with the assessment benchmark stated in s 8.2.5.2(2)(i) of the CPO Code.

132. Had Council properly considered the assessment benchmark in s 8.2.5.2(2)(i) of the CPO Code, it could have exercised its discretion under s 60(2)(b) to approve the development even if it does not comply with some of the assessment benchmarks.

133. However, it is clear from the reasons that Council did not exercise its discretion under s 60(2)(b) to approve the development even if did not comply with some of the assessment benchmarks. As noted earlier, Council's statement of reasons for the original decision approving the application stated, after listing the relevant codes, including the CPO Code:[101]

---

[95] BD, Doc 4, pp 73-75; and
[96] As noted earlier, this document was omitted from the BD. The Applicant has sought the consent of the other parties to tender it as Exhibit 2 (assuming that the BD will be exhibit 1).
[97] BD, Doc 11, pp 197-196.
[98] BD, Doc 13, pp 220-250.
[99] BD, Doc 15, pp 259-266.
[100] BD, Doc 17, p 295.
[101] BD, Doc, 4, p 74.

REASONS FOR THE DECISION

The reasons for this decision are:

Subject to the imposition of the development conditions contained within the Decision Notice, the development is able to comply with the applicable Assessment Benchmarks against which the application was required to be assessed.

REASONS FOR APPROVAL DESPITE NON-COMPLIANCE WITH ASSESSMENT BENCHMARKS

Not applicable.

134. Similarly, Council's statement of reasons, dated 27 June 2019, pursuant to s 33(1) of the JRA for the original decision concluded, at [13], that:[102]

> Given that code assessment undertaken for the Development Application determined that it either complied with all relevant assessment benchmarks or could otherwise be conditioned to comply, Council was required to approve the Development Application under section 60(2)(a) of the Planning Act and was unable to refuse the Development Application, pursuant to section 60(2)(d) of the Planning Act.

135. Specifically in relation to the CPO Code, Council's statement of reasons, dated 27 June 2019, stated at paragraph 12(c) and 12(c)(x)[103]

> Council determined that subject to the imposition of reasonable and relevant conditions within the decision notice, the Development Application was able to comply with the assessment benchmarks of the Applicable Codes:
>
> …
>
> (x) Coastal protection overlay code:
>
> (A) the proposal was determined to effectively protect people and property from coastal hazards in accordance with Overall Outcome 2(a); and
>
> (B) could otherwise be made to comply with the Coastal protection overlay code through the imposition of reasonable and relevant conditions (see conditions 36 and 37 of the decision notice granted 8 May 2018).

136. Council appears to have had regard to the CPO Code only in relation to coastal hazards.

137. Council's supporting reports and reasons, quoted above, state that the proposed development complies with *all* of the assessment benchmarks. Confirming this, if Council had recognised the assessment benchmark was not complied with, Council's reasons under ss 63(5) and 83(9) of the PA do not comply with the requirements in those sections the application was approved despite not complying with "any"[104] or "any and all"[105] of the assessment benchmarks.

138. Council could only have reached the conclusion that the "development is able to comply with the applicable Assessment Benchmarks" if it was unaware of, or did not consider, or misconstrued the assessment benchmark stated in s 8.2.5.2(2)(i) of the CPO Code. None of Council's later reasons corrected this error or addressed the CPO Code correctly. These errors could have materially affected the decision.

---

[102] As noted earlier, this document was omitted from the BD. The Applicant has sought the consent of the other parties to tender it as Exhibit 2 (assuming that the BD will be exhibit 1).
[103] As noted earlier, this document was omitted from the BD. The Applicant has sought the consent of the other parties to tender it as Exhibit 2 (assuming that the BD will be exhibit 1).
[104] PA, s 63(5)(e).
[105] PA, s 83(9)(e).

Error in considering the assessment benchmark that development maintains or enhances coastal ecosystems

139. The second error in the Council's decisions involves the assessment benchmark stated in PO12 of Table 8.2.5.3.2 (Performance outcomes and acceptable outcomes for assessable development) of the CPO Code.[106] It states:

Table 8.2.5.3.2 Performance outcomes and acceptable outcomes for assessable development

…

Protection of Sand Dunes and Coastal Creeks			
PO12	Development:- (a) maintains dune crest heights and minimises and mitigates the risk to development from wave overtopping and storm tide inundation; and (b) maintains or enhances coastal ecosystems and natural features such as coastal creeks, mangroves and coastal *wetlands*, particularly where these features protect or buffer communities and *infrastructure* from sea-level rise and coastal inundation impacts.	**AO12**	No acceptable outcome provided.

140. The Council made no reference to that assessment benchmark in any of its supporting reports and reasons, listed above at [135], relevant extracts of which were quoted above at [140]-[142].

141. A fair reading of its supporting reports and reasons suggests that Council appears to treat the CPO Code as only involving considerations of coastal hazards such as erosion and storm surge. It appears to have been unaware of, or misconstrued or considered irrelevant the assessment benchmark stated in PO12 of the CPO Code.

142. Applying the principles for interpreting planning schemes in *AAD Design* and related cases, the performance outcome in PO12 of the CPO Code states that development "maintains or enhances coastal ecosystems …". Given the purposes and overall outcomes of the code include protecting coastal biodiversity, and that turtles are part of coastal ecosystems and biodiversity, to comply with this assessment benchmark appears to require the development to maintain or enhance coastal ecosystems, including for turtles.

143. The plain and ordinary meaning of:

(a) "maintain" is "cause to continue; keep up, preserve (a state of affairs, an activity, etc)"[107] or "to keep in existence or continuance; preserve; retain"[108]; and

(b) "enhance" is "heighten or intensify (qualities, powers, value, etc); improve (something already of good quality)"[109] or "to raise to a higher degree; intensify; magnify."[110]

---

[106] AOA grounds 12, 24, 32, 33, 38 and 39.
[107] *The Australian Oxford Dictionary* (Oxford University Press, 1999), p 813.
[108] *Macquarie Dictionary* (Revised 3rd ed, Macquarie Library, 2001), p 1154.
[109] *The Australian Oxford Dictionary* (Oxford University Press, 1999), p 433.
[110] *Macquarie Dictionary* (Revised 3rd ed, Macquarie Library, 2001), p 626.

144. Given that lighting from the development shining toward the beach is acknowledged in the proponent's material as an adverse impact on turtles and responding to this impact must be the reason for the conditions about lighting such as 68-70, it is difficult to see how the conditions can do more than *mitigate* or *reduce* the adverse impacts of the development on the coastal ecosystem, rather than *maintain* or *enhance*. Even after the minor change application was approved, the conditions allow the automated opaque blinds to be open until 8pm.[111] Logically (and without entering into the merits) the conditions allow some adverse lighting impacts to the coastal ecosystem to occur. In this sense, the conditions cannot be expected to "maintain or enhance the coastal ecosystem" in comparison to either the existing use of the land (4 single storey and 1 double storey residential houses) or development that was not visible from the beach and the nearby ocean, thereby not introducing a new source of light. The development will not keep the coastal ecosystem of the same quality (i.e. "maintain") or improve (i.e. "enhance) it for turtles. There will necessarily be damage to the coastal ecosystem for turtles, even through this damage will be *reduced* by the conditions imposed by Council.

145. There is no factual finding by Council in any of its statements of reasons that the development "maintains or enhances coastal ecosystems" and it appears that Council was unaware of or misconstrued this assessment benchmark.

146. Specifically in relation to the CPO Code, Council's statement of reasons for the original decision, quoted above at [142], treated the CPO Code as concerned only with coastal hazards.

147. Council's statement of reasons for the negotiated decision notice did not refer to PO12 of the CPO Code but stated in relation to changes to condition 68 for turtle lighting that:[112]

> Condition 68 – Turtle lighting:
>
> (i) Condition 68 in its original form relates only to minimising the impact of the development on turtle nesting;
>
> (ii) The applicant's representation seeks amend condition 68 such that it also required the development to minimise its impact on turtle's sea finding behaviour and the ocean orientation of hatchlings;
>
> (iii) Council agreed with the applicant's representation on the basis that the proposed amendment effectively imposed more stringent environmental controls upon the development.

148. The language of Council's reasons suggest it was unaware of the assessment benchmark requiring the application "maintain and enhance the coastal ecosystem". It appears that Council considered there was no such requirement and that the development only had to "minimise its impact" on the coastal environment.

149. Council's supporting reports and reasons, quoted above, state that the proposed development complies with *all* of the assessment benchmarks. Confirming this, if Council had recognised the assessment benchmark was not complied with, Council's reasons under ss 63(5) and 83(9) of the PA do not comply with the requirements in those sections the application was approved despite not complying with "any"[113] or "any and all"[114] of the assessment benchmarks. The fact that Council's reasons do not

[111] See condition 70(b) of the Decision Notice for the Minor Change Application at BD, Doc 16, p 282.
[112] BD, Doc 11, p 203-204.
[113] PA, s 63(5)(e).
[114] PA, s 83(9)(e).

explain this indicates it was unaware of the non-compliance with the assessment benchmark.

150. The proponent attempts, *ex post facto*, to remedy Council's error in failing to properly consider or misconstruing the assessment benchmark in PO12 by seeking to tender the expert report of Lauren Maree Thorburn[115] and two other expert reports. For the reasons given earlier, that evidence is irrelevant and the Applicant objects to it and the other expert reports. The relevant question is to ask what the Council considered in making its decisions, not what an expert says *ex post facto* to remedy errors in the decision-making process.

151. Reading the Council's statements of reasons fairly, the lack of reference to the standard or benchmark stated in PO12 and the conditions it imposed suggests that Council did not consider the assessment benchmark that the development must maintain or enhance the coastal ecosystem to meet all of the performance outcomes. Rather, Council appears to have proceeded on the basis that it could approve these impacts by imposing conditions that mitigated them, without necessarily maintaining or enhancing the coastal ecosystem. That was a material error in the decision-making process that, with respect, should warrant the Court setting aside the decisions and remitting the application to the Council to consider according to law.

Error in considering the assessment benchmarks for views and vistas

152. The third error involved failing to properly consider or misconstruing the assessment benchmark stated in s 6.2.3.2(2)(f)(iii) of the HDRZ Code that there is no unreasonable loss of amenity for surrounding premises having regard to impacts upon views and vistas.[116]

153. None of the Council's supporting reports or reasons, listed above at [135], demonstrate that Council was aware of, or properly considered the assessment benchmark stated in s 6.2.3.2(f)(iii) of the HDRZ Code.

154. Not only did Council's supporting reports and reasons not recognize this assessment benchmark, the Detailed Assessment Report prepared by Council officers and before the decision-maker in making the original decision to approve the application contained an erroneous view that "it is also a feature of the zoning of the site that there is no express protection reflected in the relevant use code" of views for surrounding properties.

155. Council officers stated in the Detailed Assessment Report before Council for the original decision:[117]

> There are no provisions in the *Multi-unit residential uses code* which specifically protect views for surrounding properties as it is an established planning principle that a landholder has no proprietary right to a view, even though the view may have value. In this instance, it is also a feature of the zoning of the site that there is no express protection reflected in the relevant use code. Notwithstanding, the amenity of these properties has been considered and it is recommended that an increase in the southern building setbacks (to a minimum of 4.5m for the entire building facade) is a reasonable outcome which will assist in protecting privacy, retaining views and providing sufficient separation such that the external living areas of the southern neighbours continue to be adequately protected and able to be enjoyed by these residents following construction of the development.

[115] Court Doc. 24, filed 14 October 2020.
[116] AOA grounds 14, 30, 31, 32, 33, 40 and 41.
[117] BD, Doc 2, p 36.

156. While this error was not repeated in the Council's statement of reasons, neither was it corrected. While the Council is the repository of power to make the decision, it cannot be regarded as unaware of information or views possessed by its officers, who provide the collective knowledge, technical as well as factual, of the Council.[118]

157. Having stated "it is also a feature of the zoning of the site that there is no express protection reflected in the relevant use code", the Detailed Assessment Report (quoted above) went on to state that the amenity of surrounding properties had been considered and that building setbacks provided "a reasonable outcome which will assist in protecting privacy, retaining views and providing sufficient separation". The subsequent conclusion did not correct the error in substance.

158. If a decision-maker starts by assuming a people affected by a development have no rights in relation to a likely impact, what the decision-maker considers "a reasonable outcome" is tainted by the initial misconception.

159. Council addressed the HDRZ Code in its statement of reasons, dated 27 June 2019, at paragraph 12(c) and 12(c)(ii), stating:[119]

> Council determined that subject to the imposition of reasonable and relevant conditions within the decision notice, the Development Application was able to comply with the assessment benchmarks of the Applicable Codes:
>
> …
>
> (ii) High density residential zone code:
>
> (A) table 6.2.3.2.2 of the Planning Scheme relevantly provides that both the multiple dwellings units and shop (corner store) uses were consistent uses within the High density residential zone; and
>
> (B) the proposal was determined to comply with the Overall Outcomes and Performance Outcomes of the High density residential zone code by, amongst other things, positively contributing to the streetscape so as to avoid any loss of residential amenity, particularly when it is accepted that the loss of certain views is unavoidable in the High density residential zone.

160. This situation is different to the facts in *Holcim (Australia) PL v Brisbane City Council & Ors* [2012] QPEC 32, where Searles DCJ stated at [53]:[120]

> … so long as the body in question does address the question it is required to address, it does not have to refer explicitly to the statute or instrument that poses the question: the body is required to address the substance of the question, not the fact that the question is posed by a particular statute or instrument. Explicit reference to the statute or instrument will help confirm that the body did address the right question, but absence of such reference does not of itself indicate that it did not.

161. The Council staff in the Detailed Assessment Report did not merely fail to refer to the assessment benchmark stated in s 6.2.3.2(2)(f)(iii) of the HDRZ Code that there is no

---

[118] See *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR at 66 (Brennan J), citing Lord Diplock in *Bushell v Environment Secretary* [1981] AC 75 at p 95.

[119] As noted earlier, this document was omitted from the BD. The Applicant has sought the consent of the other parties to tender it as Exhibit 2 (assuming that the BD will be exhibit 1).

[120] Referring to *Notaris v Waverley City Council* (2007) 161 LGERA 230 at 264 (Tobias JA with whom Mason P and Hodgson JA agreed), which itself referred to *Hill v Woollahra Municipal Council* (2003) 127 LGERA 7 at [53] (Hodgson JA with whom Ipp JA and Davies AJA agreed). See also *Land Services of Coast and Country Inc v Chief Executive, Department of Environment and Heritage Protection & Anor* [2016] QSC 272 at [21](d) (Bond J).

unreasonable loss of amenity for surrounding premises having regard to impacts upon views and vistas, they operated under the error of law that "a feature of the zoning of the site that there is no express protection reflected in the relevant use code". The later conclusion that "a reasonable outcome" had been achieved was tainted by this error.

THE ERRORS COULD HAVE MATERIALLY AFFECTED THE DECISIONS

162. Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify a court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor may be so insignificant that the failure to take it into account could not have materially affected the decision.[121] Similarly, a decision affected by an error of law or jurisdictional error does not have to be set aside if the error could not have materially affected the decision.[122]

163. The question of whether an error could have materially affected a decision is not a back-door to turn judicial review proceedings into *de facto* merits review. The issue of whether an error could have materially affected the decision is a narrow one not requiring further evidence than was before the decision-maker.

164. In the context of the nature of the development, the provisions of the planning scheme, and the importance of correctly identifying the relevant assessment benchmarks to perform the statutory tasks required of decision-makers in s 60(2) of the PA, the three errors identified in the AOA and addressed above could have materially affected the decision.

165. A further consideration is that Council's most recent decision in relation to the development, the approval of the minor change application, on 23 July 2020, was a 7:4 slit vote of the full Council.[123] In such circumstances, it is difficult to infer what might be the outcome if the application were remitted to Council to reconsider according to law with the benefit of the Court's reasons guiding the councilors on how to properly consider the relevant assessment benchmarks in accordance with s 60(2) of the PA. Given the Court's role in these proceedings, akin to judicial review, the Court would, with respect, rightly be hesitant to speculate on whether any councilor's decision would be affected by the errors in the previous decision-making processes being corrected. The merits of the application and the discretion whether to approve or reject it in the light of it not complying with any assessment benchmarks are matters for the Council to decide.

---

[121] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J).
[122] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133 [24] – 135 [30] per Kiefel CJ, Gageler and Keane JJ; and 145 [66] – 148 [74] per Edelman J (with whom Nettle J agreed); and *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [45] – [48] per Bell, Gageler and Keane JJ; 455 [81]-[82] and 459 [91] – 460 [95] per Nettle and Gordon JJ.
[123] BD, Doc 15, p 266.

CONCLUSION

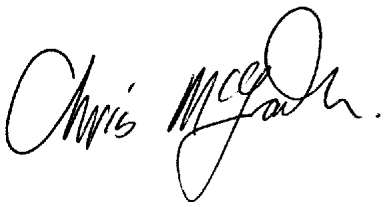
166. The Council failed to consider or misconstrued three relevant assessment benchmarks that gave objective standards that the development did not comply with in relation to:

(a) being "designed to protect the character of the beachfront when viewed from the beach" and that it "integrates with the surrounding natural landscape and skyline vegetation";

(b) "maintaining and enhancing the coastal ecosystem"; and

(c) protecting "views and vistas" of surrounding properties.

167. Reading the Council's supporting reports and reasons as a whole and fairly, it appears that Council failed to ask the right question in relation to these assessment benchmarks and it never properly assessed the application against them, as required by s 60(2). These errors were not corrected, as they might have been, in the subsequent decisions for minor changes under ss 76 and 81A of the PA. As a consequence, Council's decision-maker process failed to take into account relevant considerations, was tainted by errors of law and fell into jurisdictional error. These errors could have materially affected the decision and, as such, the decisions should be set aside the application remitted to Council to reconsider according to law.



Dr Chris McGrath
Counsel for the Applicant

23 November 2020